

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0715, State of New Hampshire v. John Martel, the court on December 13, 2007, issued the following order:

The defendant, John Martel, appeals his conviction for aggravated felonious sexual assault. He argues that the trial court erred in: (1) precluding cross-examination of the victim about her alleged prior drug use as the cause of her admission to Hampstead Hospital, and a false prior recantation of sexual assault; and (2) denying his motion to dismiss based upon the State's failure to establish the victim's age as stated in the indictment. We affirm.

A trial court has broad discretion to determine the admissibility of evidence; we will affirm its decision absent an unsustainable exercise of discretion. State v. Miller, 155 N.H. 246, 249 (2007). To prevail under this standard, the defendant must demonstrate that the trial court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id.*

In support of his claim of error, the defendant cites both Part I, Article 15 of the State Constitution and the Sixth Amendment of the Federal Constitution. Because the federal Confrontation Clause provides no greater protection than the state Confrontation Clause under the circumstances of this case, we will not undertake a separate federal analysis of his arguments. See State v. Locke, 149 N.H. 1, 11 (2002).

The defendant argues that his inability to cross-examine the victim concerning her drug use as a cause for her admission to Hampstead Hospital allowed the State to portray her as a victim and constrained his ability to attack her credibility. The record, however, indicates that the State elicited testimony from the victim that she had run away from home, smoked cigarettes, consumed alcoholic beverages, engaged in sexual activity since the age of fourteen and married a drug addict. The record further reveals that it was defense counsel rather than the State who asked the victim questions about the reason for her admission to Hampstead Hospital. Because we conclude that the record supports the trial court's decision that the prejudice of the excluded evidence substantially outweighed its probative value, particularly in light of the other evidence presented by the State, and further that the State did not create a misimpression, see State v. Morrill, 154 N.H. 547, 549-50 (2006), we find no error in the trial court's ruling excluding the evidence.

The defendant also contends that the trial court erred in excluding evidence of the victim's recantation of an earlier sexual assault. We note that the defendant conceded before the trial court that it was likely that the recantation was false, rather than that the victim's report of the sexual assault was false. Even if we assume without deciding that the exclusion of this evidence was error, we conclude that any error was harmless. See *State v. Wall*, 154 N.H. 237, 245 (2006) (erroneous admission of evidence may be harmless if State proves beyond reasonable doubt that alternative evidence of defendant's guilt is of overwhelming nature, quantity, or weight, and if inadmissible evidence is merely cumulative or inconsequential in relation to strength of State's evidence of guilt.).

The defendant was charged with engaging in a pattern of sexual assaults with the victim when she was between the ages of thirteen and fifteen. The evidence presented at trial included the victim's extensive testimony about the defendant's assaults, testimony from the defendant's former employer that the victim shared a bedroom with the defendant during the two months that they lived together in the employer's home, and testimony from the daughter of the employer that the victim and defendant moved into the home at the same time, were boyfriend and girlfriend and shared a bedroom. The defendant also cross-examined the victim at length about her motivation to fabricate testimony in light of her ongoing custody dispute with the defendant about their child. Based upon the record before us, we conclude that the evidence of the assaults was of an overwhelming weight and that evidence of the recantation was inconsequential in relation to the strength of the State's evidence.

The defendant also argues that the trial court erred in denying his motion to dismiss because the State failed to establish the victim's age as stated in the indictment, and further that its jury instructions impermissibly amended the substance of the indictment.

The indictment alleged that the assaults occurred between May 8, 1995 and May 7, 1996. There was no dispute that the victim's birth date was May 8, 1980; it appeared above the indictment. Accordingly, it is clear that the dates alleged encompassed the time between the victim's fifteenth birthday and the day before her sixteenth birthday. In light of this, to construe the phrase "between the ages of thirteen and fifteen years old" as excluding the year during which the victim was fifteen and during which the indictment alleged the acts occurred is unreasonable. Moreover, we note that the defendant has not demonstrated that any alleged amendment caused him any prejudice. See *State v. Elliott*, 133 N.H. 759, 764–65 (1980).

Having reviewed the jury instructions in their entirety, we conclude that they adequately and accurately explained each element of the offense; accordingly, we find no error. See State v. Littlefield, 152 N.H. 331, 334 (2005).

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**